(5)

No. 91-1546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BOB SLAGLE,
Appellant,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

STATE OFFICIALS' SUPPLEMENT TO APPELLANT'S JURISDICTIONAL STATEMENT, AND SUPPLEMENTAL APPENDIX

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September 4, 1992

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STATE OFFICIALS' SUPPLEMENT TO APPELLANT SLAGLE'S JURISDICTIONAL STATEMENT

Pursuant to Court Rule 18.9, the Governor, Attorney General, and Secretary of State of Texas (collectively, "the state")[1] supplement appellant Slagle's jurisdictional statement. The purpose is to notify the Court of developments since the Court's summary affirmance on June 29, 1992, of the state's appeal, which are related to Question 2 of the questions presented in this appeal. Question 2 asks "[w]hether [detailed] actions of a district judge give rise to an appearance of impropriety sufficient to require reversal[.]"[2]

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[1] These three state officials appealed from the same January 10, 1992, stay denial as the appellant here. Their appeal, docketed as No. 91-1270, ended with the Court's summary affirmance in *Richards v. Terrazas*, 112 S.Ct. 3019 (1992). Under Rule 18.2, they are also parties to this appeal. The questions presented in the *Richards v. Terrazas* appeal were different than the questions presented here.

[2] The text of each item in the following summary is in the

1. On May 15, 1992, the nineteen-member Judicial Council of the United States Court of Appeals for the Fifth Circuit (with a recusal by Judge Garwood, a member of the three-judge district court) unanimously issued a public reprimand of Judge Nowlin for "his conduct" in crafting the court-ordered Senate plan which is before this Court in this appeal ("*Terrazas* interim plan"). The Council admonished Judge Nowlin "that his actions described in the report are ***inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges***[.]" 1a. (emphasis added). Canon 2a prohibits *ex parte* contacts, and Canon 3a(4) prohibits actions creating an appearance of impropriety.

2. The Council adopted the findings and conclusions of the five-member special committee which investigated a complaint filed against Judge Nowlin under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372. 3a-28a.[3]

3. On July 21, 1992, Judge Nowlin recused himself in this and two other redistricting cases involving the state. 29a-32a. The Chief Judge of the Fifth Circuit designated his replacement the same day. 33a.

4. On July 27, 1992, a three-judge panel of the United States District Court for the District of Columbia, in *Texas v. U.S.*, granted summary judgment for the state, preclearing under section 5 of the Voting Rights Act the state's legislatively-enacted senate redistricting plan,

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supplemental appendix accompanying this submission. All page references are to it unless otherwise indicated.

[3] The proceedings, including the evidence and statements upon which the report is based, are confidential and sealed, unavailable to the state and the public. *See* 28 U.S.C. § 372(c)(14). The Office of the Attorney General of Texas had made its own inquiry into the matter, issuing an Interim Report on Inquiry of Court-Ordered Senate Redistricting Plan on February 19, 1992. After reviewing it, the special committee "immediately arranged to take Judge Nowlin's sworn testimony." 5a.

commonly known as SB1. 34a-49a. Comparing SB1 with the *Terrazas* interim plan, the court found that SB1 "increases the number of districts in which minorities can elect candidates of their own choosing from eight to nine." 44a. The court adopted the affidavit of the state's expert, Mr. Moak, as its findings of fact. 45a. The Moak affidavit is reproduced at 50a-64a.

5. On August 21, 1992, the *Terrazas* three-judge district court issued an Order and Reasons in response to motions filed trying to stop the state's implementation of its precleared legislative plan, SB1, for the general election. 65a-85a. The court determined that its orders of December 24, 1991, and January 10, 1992 -- the ones before the Court in this appeal -- covered the state's 1992 general elections, too, even though the decretal parts of the two orders specifically use the word "primary" to describe the affected 1992 elections. 82a-84a. The *Terrazas* court then ordered the state "to carry out the 1992 Texas Senate general elections according to and utilizing the senate districts established in this Court's said December 24 and January 10 orders." 84a-85a. The August order rejects the argument made in the *appellees'* still-pending motion to dismiss this appeal for mootness because the appealed orders affected only the primaries. *See* Appellees' Motion to Dismiss or Affirm 4-7.[4]

As a result of the August 21st order, the state is enjoined from using its legislatively-enacted, precleared plan (which has been judicially-determined to offer

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[4] The identical appellees, as plaintiffs, used the identical language of the identical orders to successfully argue precisely the opposite proposition, which was adopted in the August 21st decision. The August 21st decision retroactively undermines the uncontradicted basis of the state's appeal in *Richards v. Terrazas*. *See* Juris. St., No. 91-1270, at 7 n.5 (filed February 5, 1992) (appealed order only affected primaries). Notwithstanding the clear admonition in Rule 15.1, the motion to affirm of the appellees in *Richards* (also, the appellees here) neither argued nor suggested that the court-crafted interim plan applies to the general election, too.

superior minority voting rights protection) and to use instead the inferior court plan whose crafting (the Council determined) created an appearance of impropriety by Judge Nowlin.

Respectfully submitted,

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September 4, 1992

SUPPLEMENTAL
APPENDIX

Before: Henry A. Politz, Chief Judge; Carolyn Dineen King, Will Garwood*, E. Grady Jolly, Patrick E. Higginbotham, John M. Duné, Jr., Jacques L. Wiener, Jr., Rhesa H. Barksdale, Emilio M. Garza, and Harold R. DeMoss, Jr., Circuit Judges; Morey L. Sear, John V. Parker, F. A. Little, Jr., Neal B. Biggers, Jr., Henry T. Wingate, Mary Lou Robinson, George P. Kazen, William Wayne Justice, and H. F. Garcia, District Judges.

Filed May 15, 1992

IN RE: The complaint of Lewis H. Earl against United States District Judge James R. Nowlin under the Judicial Conduct and Disability Act of 1980.

ORDER

After due consideration of the attached report of the investigative committee appointed in this matter, and the evidence upon which that report is based, the Council adopts the committee's findings and conclusions and approves and accepts its recommendation for the disposition of this complaint. For reasons stated in the report, the Council reprimands Judge Nowlin for his conduct. It further admonishes Judge Nowlin that his actions described in the report are inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges and are deemed prejudicial to the effective administration of the business of the courts. It is imperative that Judge Nowlin exercise greater care in such matters in the future and he is so directed.

FOR THE COUNCIL

s/s

Henry A. Politz
Chief Judge, Fifth Judicial Circuit

May 15, 1992

• Recused

UNITED STATES COURT OF APPEAL
Fifth Circuit

Date: May 5, 1992

To: The Fifth Circuit Judicial Council

Subject: Report of Special Committee of the Fifth Circuit Judicial Council on Complaint of Lewis H. Earl against Judge James R. Nowlin

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I. Background

Lewis H. Earl of Post, Texas, filed a complaint on January 21, 1992, with the Fifth Circuit Judicial Council against Judge James R. Nowlin. On February 5, 1992, Chief Judge Henry A. Politz dismissed the complaint. On February 10, however, the Chief Judge vacated his earlier order and directed that the complaint be investigated by a special Committee. As required by 28 U.S.C. § 372 (c) (4) (A), the Chief Judge appointed himself and an equal number of circuit and district judges to the Committee, appointing Circuit Judges W. Eugene Davis (Chairman) and Harold R. DeMoss, Jr.; and District Judges William Wayne Justice and George P. Kazen.

The charge against Judge Nowlin relates to his conduct while serving as a member of a three-judge district court empaneled to preside over consolidated lawsuits, bearing docket numbers A-91-CA425, 426, and 428, commonly referred to as the Terrazas litigation. The Terrazas plaintiffs seek to reapportion the Texas legislature

because of alleged violations of the Voting Rights Act and the Constitution.

The Terrazas suits were filed in May 1991 and were lodged in Judge Nowlin's division. At Judge Nowlin's request, then-Chief Judge Charles Clark empaneled a three-judge court and designated Circuit Judge Will Garwood and District Judge Walter Smith to sit with Judge Nowlin on the case. Judge Nowlin was the managing judge for the litigation. Following discovery and other pretrial activity, the court conducted a four-day preliminary injunction hearing during December 10-13, 1991. The three-judge panel issued a preliminary injunction on December 24, 1991, imposing an interim redistricting plan for the 1992 election.

Shortly after the preliminary injunction issued, the Attorney General of Texas and other unsuccessful litigants in the Terrazas litigation began to complain of misconduct by Judge Nowlin and his staff. The core of the complaint was that Judge Nowlin had consulted State Representative George Pierce and enlisted his assistance in drawing the court-ordered redistricting plan. Mr. Earl also complained of communication between Judge Nowlin and Chief Justice Phillips of the Texas Supreme Court. The complaints received extensive press coverage. A number of motions based upon these facts, including motions to recuse Judge Nowlin, were filed in the Terrazas litigation.[1]

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1 The motion to recuse was denied. An application for a writ of mandamus has been filed and is currently pending before a panel of the Fifth Circuit. The Committee expresses no opinion on the issue of recusal.

II. The Committee's Investigation

Shortly after the Chief Judge convened this Committee, the Texas Attorney General's office furnished us with copies of statements, depositions, and other exhibits it had obtained. After reviewing the investigative material and press clippings furnished us, the Committee immediately arranged to take Judge Nowlin's sworn testimony. All members of the Committee met in New Orleans and took Judge Nowlin's testimony on the morning of February 28.

We then arranged to take additional statements in Austin, Texas, on March 5, 1992. On that day, with all Committee members present, we took the sworn statements of the following witnesses: Britt Buchanan and J.D. Munn, law clerks to Judge Nowlin; Tina Hengst, computer operator at the Texas Legislative Council; Texas State Representative George Pierce; Michelle Bray, law clerk to Judge Garwood; Judge Will Garwood; and Judge Walter Smith. We also received a letter from Chief Justice Tom Phillips of the Texas Supreme Court in response to our inquiry about the circumstances surrounding this complaint.

III. The Facts

Based upon our investigation, we relate below the relevant facts that bear on the complaint against Judge Nowlin.

Judge Nowlin served in the Texas legislature for nearly 13 years prior to his appointment to the United States District Court in late 1981. While in the Texas legislature, Judge Nowlin represented a district in Bexar County that included the affluent towns of Alamo Heights and Terrell Hills, which are surround by the City of San

Antonio. When the Terrazas litigation was filed, Judge Nowlin learned from some of his acquaintances in the legislature that the Texas Legislative Council (TLC), an arm of the legislature, had acquired a sophisticated computer program that was very helpful in drawing district maps. In the weeks before the December 10 hearing, Judge Nowlin made arrangements for the three-judge court to have an account on TLC's computer system, called the RED.APPL (pronounced red apple) system. The RED.APPL's database contains extensive geographic and demographic information essential for redistricting. The three-judge court had two accounts on the RED.APPL system. These were called NOWL AND NOW2. Each of these accounts can be considered a separate file in which information, maps, or similar documents can be stored and then called up when needed. Maps and other data from three proposed redistricting plans were entered in these accounts: (1) the Senate plan adopted by the Texas legislature in the 1991 regular session (SB-31); (2) the plan proposed by the plaintiffs (plaintiffs' plan); and (3) the Quiroz plan, a plan proposed in a consent judgment of a Texas state court.

Three law clerks worked on the RED.APPL system: Britt Buchanan and J.D. Munn from Judge Nowlin's chambers, and Michelle Bray from Judge Garwood's chambers. Britt Buchanan was the clerk from Judge Nowlin's chambers with primary responsibility for working on the redistricting plan; J.D. Munn spent very little time working on it. Judge Nowlin instructed his clerks to work primarily with the plaintiffs' plan as a starting point and make modifications to that plan on the NOW2 account.

Judge Garwood instructed Ms. Bray to use the SB-31 legislative plan as a starting point and make modifications to that plan on the NOWL account.

Law clerks needing to work on the RED.APPL system were required to make an appointment with TLC for computer time. When they arrived at the appointed hour a computer operator met them in the lobby of the computer area. The operator used an entry card to gain entry to the computer rooms and the law clerk logged in. The law clerk and the operator would then enter the separate computer room. The law clerk would instruct the operator to enter the name of the account (i.e., NOWL or NOW2) upon which he or she desired to work. After the operator entered the account name, the operator would turn the keyboard to the law clerk who would then enter the password. Although the account name appeared on the screen, the password did not. Thus, no one could gain access to either account without the proper password, and only the court personnel allegedly knew the password.

Once the account name and password were entered, the law clerk was ready to work on the account. Most of the work related to maps, which were part of the plans proposed by the litigants. In working with these maps and changing district lines, the law clerk directed the operator to make a change in a district line by pointing to the map on the screen and directing the operator where to move the line. The operator would then, by use of a "mouse," move the district line until it was in the desired location. The relevant voter population and racial and ethnic information

would print out on the screen so that the clerk could see what results had been accomplished by the change.

Much of the work was by trial and error, and the law clerk would continue to make changes until the voting population figures reached the desired level. When a law clerk completed his or her work on the RED.APPL for the day, the operator ordinarily would print out a map showing the geographic location of the district lines. A separate printout showed the ethnic and racial voting population composition. The law clerk then took this printout back to chambers for consultation with the judge.

With this background, we now turn to the specific facts giving rise to the complaint.

A.

Representative George Pierce served with Judge Nowlin in the Texas House of Representatives from approximately 1979 until Judge Nowlin was appointed to the district court in 1981. The two were acquainted before that, however, because Pierce worked as a staff member to various legislative committees before 1979, while Nowlin was a representative. During the 1980-81 redistricting process, Rep. Pierce was actively involved in drafting various plans proposed at that time, and developed considerable skill and familiarity with the use of computers in the preparation of redistricting plans. Judge Nowlin knew of Rep. Pierce's skill and intense interest in the use of computers for this purpose; he considered Pierce a "computer nut". During the two years they were both members of the House, they did not serve on the same legislative committees. Although the two men were not

close friends and did not visit in each other's homes, they had some contact because they were both Republicans serving from the San Antonio area.

After Judge Nowlin was appointed to the district court, he had very little contact with Rep. Pierce before this redistricting suit was filed. After this suit was filed, Rep. Pierce first made contact with Judge Nowlin in late November 1991, after a Texas state court adopted a redistricting plan (the Quiroz plan). He called Judge Nowlin to complain about the state-ordered plan and to inquire about the federal action. Judge Nowlin told him that a hearing had been set for December.

During the course of their conversation, Rep. Pierce told Judge Nowlin that he was not going to seek re-election. Pierce told him that his combined years in the House and other state employment offered him a good retirement and that his wife wanted him to retire. Judge Nowlin understood from this conversation that Pierce was leaving political life. Judge Nowlin knew that one was not eligible to receive retirement benefits under the Texas retirement plan while holding public office in Texas.

The next conversation Rep. Pierce had with Judge Nowlin was shortly after the three-judge court hearing of December 10. It was common knowledge in the legislature that the court was drawing a plan on TLC's RED.APPL computer system. Pierce called Judge Nowlin to tell him that he did not think that the court's work product was secure on the RED.APPL system. He told Judge Nowlin that he believed TLC had the ability to gain access to the court's work in progress. A series of other minor contacts

followed. Rep. Pierce stopped by Judge Nowlin's office on one occasion, but Judge Nowlin was not there and did not see him. Rep. Pierce had intended to ask Judge Nowlin if an opinion was imminent. The next conversation was on Saturday, December 20, or Sunday, December 21. On this occasion, Judge Nowlin called Pierce to complain that Bob Kelly, the executive director of TLC, had failed to show up for an appointment. Judge Nowlin had scheduled a meeting with Mr. Kelly at the TLC office after Kelly proposed that TLC review the court's plan for technical errors, such as omission of a voting precinct. This failure of Mr. Kelly to maintain the appointment with Judge Nowlin increased Judge Nowlin's concern, prompting Judge Nowlin's call to Rep. Pierce to ask him to check on Kelly.

The next meeting between Rep. Pierce and Judge Nowlin, and the events related to that meeting, form the basis of the complaint at issue here. On the morning of December 23, Judge Nowlin and his staff were busily engaged in preparing a proposed draft opinion for the three-judge court. This included putting the final touches on the district lines of the plan Judge Nowlin planned to propose to his fellow judges. In making his final review of this Senate plan, he decided to move two affluent small cities, Alamo Heights and Terrell Hills, out of minority District 19 and put them in majority District 26. Judge Nowlin was familiar with these two towns because he had represented them in the Texas legislature.

Rep. Pierce stopped by Judge Nowlin's chambers around mid-morning on December 23 to report on his attempt to locate Mr. Kelly. After doing so, Judge Nowlin

discussed with Pierce the change he had decided to make in the Senate Districts 19 and 26. Judge Nowlin told Rep. Pierce that he wanted to move Alamo Heights and Terrell Hills from District 19 to District 26. Judge Nowlin testified that he also told Rep. Pierce that a loosely defined community known as Castle Hills would have to be moved from District 26 to District 19. According to Rep. Pierce, Judge Nowlin did not specify what areas he wanted moved out of District 26, nor did he mention Castle Hills. Judge Nowlin and Rep. Pierce did not discuss the location of the residences of any incumbents in the Texas legislature.

Judge Nowlin decided to send Rep. Pierce and one of the judge's law clerks to make the desired changes on the RED.APPL system. Britt Buchanan, Judge Nowlin's clerk most familiar with the redistricting case, was working on a draft of the proposed opinion. Judge Nowlin decided to send his second clerk, J.D. Munn, and called Mr. Munn into his chambers where he was speaking with Rep. Pierce. Judge Nowlin instructed Mr. Munn to accompany Rep. Pierce to TLC to make changes in Senate Districts 19 and 26 in Bexar County. Mr. Munn testified that he recalled hearing Judge Nowlin tell his co-clerk, Britt Buchanan, about a week earlier that he wanted to move some neighborhoods in San Antonio, and that he specifically heard Judge Nowlin mention Alamo Heights. Mr. Munn assumed that the changes the Judge had talked with Rep. Pierce about related to that earlier conversation. Although Mr. Munn was not informed as to the specific changes to be made, he thought that Judge Nowlin had told Rep. Pierce what changes to make.

Judge Nowlin testified that he sent Rep. Pierce with Mr. Munn because of Pierce's dual familiarity with computers and the communities around San Antonio. Mr. Munn was unfamiliar with the San Antonio area. Judge Nowlin felt that Rep. Pierce's help at TLC would speed up the process. Judge Nowlin instructed Mr. Munn to bring back to chambers for the court's review a map and printout of the changes he and Rep. Pierce made.

Mr. Munn proceeded to TLC with Rep. Pierce, as instructed. They gained access to the computer room in the usual way, as described above. Tina Hengst, one of the TLC operators, met them in the lobby and used her card to gain entry into the computer area. Mr. Munn then signed in on the log book. The computer operator entered the NOW2 account, as instructed by Munn. Mr. Munn then entered the password. After the operator pulled up the account, Mr. Munn made some changes in accordance with Judge Nowlin's instructions that were unrelated to the Bexar County changes under discussion here. Rep. Pierce had nothing to do with those changes.

After Mr. Munn finished these changes, he and Rep. Pierce changed positions so that Rep. Pierce could direct the computer operator. The operator, at Rep. Pierce's request, then zoomed in on Bexar County. Rep. Pierce proceeded to give instructions to Ms. Hengst. He showed Ms. Hengst on the map what areas to move out of District 19. This included generally the area within the city limits of Alamo Heights and Terrell Hills, plus some adjacent areas that were within the Alamo Heights Independent School District. He then instructed Ms. Hengst to move

Voting Tabulation Districts (VTDs) in District 26 that were closest to District 19 into District 19 to make up for the VTDs that had just been moved out of District 19. Castle Hills was one of the communities moved from District 26 to District 19. Rep. Pierce made two or three moves before he restored the total voting populations in the two districts to the required levels, and minority voting population in District 19 to the desired level. Rep. Pierce directed Ms. Hengst on the computer for approximately 20 to 30 minutes.

After these changes were made, Ms. Hengst gave Mr. Munn a printout of a map reflecting the districts as modified. She also gave him a printout of the new demographic statistical information. Mr. Munn took the map and additional information back to Judge Nowlin.

The changes Rep. Pierce and Mr. Munn made to Senate Districts 19 and 26 the morning of December 23 produced a slight increase in the percentage of Hispanic voting-age population in District 19, from 55.78% to 56.25%, and an increase in minority (black and Hispanic) voting-age population from 60.37% to 60.69%. The Pierce/Munn changes also resulted in a slight decrease, from 19.16% to 18.89%, in the percentage of minority voting-age population in District 26, which was already a majority Anglo district.

The only portion of the court's work product Rep. Pierce observed was the Senate districts in Bexar County located in the NOW2 account. The NOWL account was not displayed to Rep. Pierce. In making the changes to Districts 19 and 26, Rep. Pierce did not call up on the

computer screen the location of the residences of any incumbent members of the Texas Senate or House of Representatives.

During the afternoon of December 23, Judge Garwood and Judge Nowlin met to discuss the final opinion and court redistricting plan for the entire State. They conferred at length with Judge Smith on the telephone. The judges agreed to adopt the plan that had been drawn on the NOWL account with certain modifications to be made that afternoon. Among those modifications were the changes to Senate Districts 19 and 26 discussed above. Judges Garwood and Smith explained that the increase in minority voting population in District 19, the minority district, was their reason for approving the changes. Neither Judge Garwood nor Judge Smith had any knowledge that Rep. Pierce had played a role in making the changes in these two districts.

Shortly after 5:00 p.m. on December 23, Britt Buchanan and Michelle Bray went to the TLC office to make the final changes on the maps in the NOWL account. They attempted to duplicate in the NOWL account the changes Rep. Pierce and Mr. Munn had made to Senate Districts 19 and 26 in the NOW2 account earlier that day. Thus, except for minor errors the law clerks made in duplicating the NOWL map of Bexar County showing Senate district lines, the changes Rep. Pierce made, at Judge Nowlin's direction, in Districts 19 and 26 became part of the final plan adopted by the court.

Rep. Pierce formally announced on January 8, 1992, that he would seek election to the Senate from District 26.

Pierce designated his campaign treasurer with the Texas Secretary of State that same day. When Texas officials learned that Pierce had played a role in modifying Senate District 26 on December 23 and that he had announced his candidacy for this district, obvious inferences were drawn. The Attorney General of Texas and others concluded that Judge Nowlin allowed his former colleague to draw himself a safe Senate district.

B.

In evaluating Judge Nowlin's conduct, one of the central questions that concerns us is whether Judge Nowlin knew or suspected on December 23, 1991, that Rep. Pierce was considering running for a legislative office, particularly a seat in the Senate from District 26.

As stated above, Judge Nowlin, in his testimony to us, asserted that Rep. Pierce told him in late November 1991 that he intended to retire from the legislature. According to Judge Nowlin, Pierce told him that he was eligible for retirement and that his wife had insisted that he retire.

Rep. Pierce, in his sworn statement to this Committee, confirmed this discussion with Judge Nowlin. He asserted that in his conversation with Judge Nowlin in late November 1991, he told Judge Nowlin that he was not going to run again. Rep. Pierce told Judge Nowlin that he was eligible for a good retirement, and his wife wanted him to retire. According to Pierce, this would have made it plain to Judge Nowlin that he did not intend to run for any legislative office because everyone familiar with the system knows that one must be out of office to be eligible for

retirement. Rep. Pierce told us further that he had no reason to believe that Judge Nowlin had any knowledge before December 1991 of any plans he might have had to run for the Senate. This statement may be read as contradictory to a statement Pierce made in his February 3, 1992, deposition taken by the Texas Attorney General in connection with the Terrazas litigation. Rep. Pierce testified as follows in that deposition:

> Q: Would it be possible that Judge Nowlin would have been aware of your interest in a Senate race within the last six months?
>
> A: Sure. Let's face it, we are friends . . .
>
> Q: So it's your belief that he would have been aware of your interest in seeking a Senate race within the last six months?
>
> A: Sure, it's been in the newspapers. It's been in publications. It's been put out everywhere.

We questioned Rep. Pierce about this apparent inconsistency. He testified that he understood the question in the deposition to address Judge Nowlin's knowledge of his interest in the Senate seat within the six-month period preceding his February deposition. Rep. Pierce stated to us that when he answered the question in the deposition, he was thinking of knowledge Judge Nowlin obviously acquired from extensive press coverage in January and February 1992 about this incident. In other words, Rep. Pierce stated that he was addressing his impression of Judge Nowlin's knowledge during the weeks preceding the

February 3 deposition and not during November and December 1991.

The Texas Attorney General points to an earlier reference by Pierce in his deposition that he had begun to formulate an interest in running for the Senate about a year before his deposition was given. Rep. Pierce explained to us, however, that while he indeed had expressed interest in running for the Senate in early 1991, he later changed his mind.

We also questioned Rep. Pierce about what ultimately made him decide to run for the Senate from District 26. He stated that when it became apparent to him that the only candidate for the Senate seat from Bexar County was Alan Schoolcraft, he decided to run. This fact was critical to his decision because of his impression that Alan Schoolcraft was not a strong candidate. Rep. Pierce concluded that if he did not run, the District 26 senator would come from one of the counties north of Bexar County, and he did not want to see Bexar County lose this Senate seat.

The Fifth Circuit librarian, at our request, investigated whether any newspaper articles appeared in Austin or San Antonio before December 23, 1991, concerning Rep. Pierce's plans to run for the Senate. She found no articles in any Austin newspaper. She did find articles in the San Antonio Light in May, June and December 1991 discussing the possibility that Pierce would run for the Senate.

Judge Nowlin does not subscribe to or regularly read a San Antonio newspaper. We find no reason to believe

that Judge Nowlin had knowledge of the articles in the San Antonio Light suggesting that Pierce might run for the Senate. We also find no reason to discredit Judge Nowlin's statement that Rep. Pierce told him in unequivocal terms that he had no plans to run for any legislative office. Rep. Pierce's sworn statement to our Committee on this point fully confirms Judge Nowlin's testimony. Rep. Pierce's explanation of his arguably inconsistent prior testimony is not implausible. The prior testimony was in response to a questions inviting Rep. Pierce to speculate about Judge Nowlin's knowledge, and the question was ambiguous with respect to the time frame in which Judge Nowlin's knowledge was to be evaluated. We conclude that, whatever Pierce's actual political intentions may have been in December 1991, Judge Nowlin did not regard Pierce as a candidate for the state Senate at that time.

Moreover, the evidence clearly establishes that the changes to District 19 and 26 were initiated by Judge Nowlin, not by Rep. Pierce. Judge Nowlin was intimately familiar with Terrell Hills and Alamo Heights. He neither needed nor sought input from Pierce on whether those two entities had more in common with District 19 or 26. Judge Nowlin felt some loyalty toward the two towns because he had represented them in the legislature. Judge Nowlin believed, correctly, that by transferring these two towns to District 26, he could place those entities in a District of what he perceived to be more common interests, and simultaneously increase the minority voting population in District 19.

The evidence further reflects that in agreeing to implement Judge Nowlin's instructions, Rep. Pierce was not enhancing his own electability. Pierce testified persuasively that Senate District 26, as finally drawn, was not a district from which he could easily win.[2] Alan Schoolcraft, a potential District 26 candidate, had represented Alamo Heights and Terrell Hills for some time in the Texas House of Representatives. On the other hand, Rep. Pierce's core supporters came from the Castle Hills area, which he took out of District 26 and put into District 19. Indeed, one of the documents that tracked the changes Rep. Pierce directed on December 23 demonstrates that Rep. Pierce moved more VTDs from Castle Hills that were necessary. The computer-generated tracking device shows that, after the populations of District 19 and 26 were within 5% of the desired level (which is all that is required), additional voting precincts were shifted out of District 26 into District 19. When we examined the historical voting patters of the VTDs Rep. Pierce moved out of District 26, particularly those he moved unnecessarily, the records indicated that those voters strongly supported Rep. Pierce.

C.

Although the above charge is the central one made against Judge Nowlin, Mr. Earl and the Attorney General of Texas make three additional, somewhat related charges that require discussion.

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2 Although we do not discount the political damage to Rep. Pierce from the extensive publicity surrounding these changes, we observe that later events bore out his pessimism. In the March 1992 primary, Rep. Pierce ran-fourth in a five-person race, garnering 8% of the vote.

First, the complainants charge that Rep. Pierce and a number of other members of the Texas legislature made multiple telephone calls to Judge Nowlin. This is supported by computer records that automatically document each call made from legislative offices in Austin. The computer record shows both the calling number and the number called, as well as the approximate length of the call. The record does not, however, identify either the person who originated the call nor the person who answered the call. The relevant records reflect approximately 22 calls from Rep. Pierce's office to Judge Nowlin's chamber. Almost all of these calls are shown as lasting two to three minutes. In addition to these calls, the records reflect a large number of calls in the two-to-three minute range from twelve other state legislators. We note initially that the telephone call recorder registers all calls made, not just completed calls, and that its minimum register is two minutes, even if a call actually lasts only a few seconds.

Our investigation revealed that Judge Nowlin seldom personally answers the telephones in his chambers. The telephone is answered either by the secretary, a law clerk, or an answering machine. Frequently, when Judge Nowlin and his staff are busy, they activate the answering machine. Rep. Pierce's calls to Judge Nowlin that exceed two or three minutes are accounted for and are discussed above. The law clerks, as well as Judge Nowlin, testified that while the redistricting suit was in progress, his office received multiple calls daily from members of the public including members of the state legislature seeking a progress report on the suit. The caller typically was

interested in knowing the date the court would reach a decision. Some of these calls were taken on the answering machine and the caller spoke with no one. On other occasions, the caller spoke with the secretary or a law clerk. From the evidence and our independent knowledge of the acute interest the public holds for litigation of this type, we have no reason to doubt this explanation for the multiple calls made from legislative offices to Judge Nowlin's chambers. We therefore draw no interferences of impropriety by Judge Nowlin from this evidence.

Mr. Earl, and some reports from the press, also complain about contact between Judge Nowlin and Chief Justice Tom Phillips of the Texas Supreme court. Judge Nowlin and Chief Justice Phillips have given the Committee a consistent, plausible explanation for this contact. The Texas Supreme Court had before it a writ application seeking review of the state district court consent judgment that imposed the Quiroz plan. On December 3, 1991, Chief Justice Phillips contacted Judge Nowlin and asked Judge Nowlin to postpone commencement of his hearing until the afternoon of December 10 so that counsel could appear before the Texas Supreme Court for argument of that appeal. Judge Nowlin, Judge Garwood, and Judge Smith discussed the effect of the state court judgment and whether they should wait until the Texas Supreme Court reviewed the Texas District Court order before proceeding with the suit pending before the three-judge court. Later, Judge Nowlin contacted Chief Justice Phillips to inquire whether the Supreme Court had issued a decision on its review of the Quiroz plan. On December 17, 1991, Chief

Justice Phillips called Judge Nowlin immediately after the Texas Supreme Court released its opinion.

We find no impropriety in the contacts between Judge Nowlin and Chief Justice Phillips. The conversations did not relate to the merits of the litigation. Rather, they were for the purpose of coordinating hearings in the related litigation and learning when the Texas Supreme Court issued its opinion.

D.

Finally, the Attorney General and the press have suggested that Judge Nowlin permitted Rep. Pierce to alter District 26 to place the residences of some of his potential opponents for the Senate seat outside of District 26. These potential opponents include Cyndi Krier, Jeff Wentworth, and Alan Schoolcraft.

We not initially that residence inside a senatorial district is not a requirement for eligibility to run in that district under the court's redistricting plan. Rather, candidates may run for any district regardless of their place of residence. Nevertheless, living outside the district in which a candidate runs can be an obvious political liability.

We are persuaded from the evidence that Judge Nowlin had no intention to move any of these potential Senate candidates' residences outside any particular district. Judge Nowlin and Rep. Pierce did not discuss the location of residence of any incumbents. The law clerks who did most of the work on the computer testified that they had no knowledge of the location of the residences of any of these potential candidates. They also denied receiving any instructions from Judge Nowlin to fix the lines

in such a way as to place the residences of these candidates either in or out of any particular district.

Rep. Pierce also denied considering the residences of any of these potential candidates when he moved the lines for District 19 and 26. Pierce's changes apparently moved Jeff Wentworth and Cyndi Krier's residences from District 26 to District 19. Their residences were near the District 19 line and Castle Hills. Once Castle Hills was moved into District 19, their residences would have logically moved into District 19. In other words, Rep. Pierce simply moved adjacent VTDs from District 26 into District 19; no apparent irregularity is presented about which VTDs were moved from District 26 to District 19. We reiterate that the locations of incumbents' residences were not displayed to Rep. Pierce on the RED.APPL system on December 23.

Alan Schoolcraft's home was in the northeastern corner of Bexar County. A single VTD, which included his residence, was moved from District 24 into District 26. We draw no negative inference from this isolated change, however, for two reasons. First, Rep. Pierce was not involved with this decision. As we interpret the testimony and the computer records, this change was made around 5:00 p.m. on December 23 by Britt Buchanan, who apparently was trying to increase minority representation in District 24. Second, the change in Mr. Schoolcraft's VTD placed his residence inside of District 26, it having been in District 24 in previous maps. Obviously, it would have been against Rep. Pierce's interest to move a potential rival into the District from which Pierce intended to run.

We find no merit, therefore, to the complaints that are predicated on these three latter grounds. We do, however, find substance to the first complaint discussed above, which we analyze below.

III. CONCLUSION AND RECOMMENDATION

The Judicial Council must determine whether Judge Nowlin "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372 (c) (1). We believe it may be helpful to consider first some of the charges leveled against Judge Nowlin that have not been established. We find no evidence that Judge Nowlin had a corrupt or evil motive in asking Rep. Pierce to assist in altering the court's redistricting plan. As indicated above, we do not believed that Judge Nowlin knew in December 1991 that Rep. Pierce planned to run for a legislative seat in 1992. Moreover, Judge Nowlin did not intend to allow Rep. Pierce to draw himself a favorable Senate district from which to run. We conclude that Judge Nowlin was rushing to get his proposed opinion in final form to present to his fellow panel members later that day so that it could be released before Christmas. He had confidence in Rep. Pierce, who was very knowledgeable about computer redistricting and about the geography of Bexar County. It would have taken Mr. Munn and Ms. Hengst, acting alone, much longer -- perhaps several hours -- to accomplish the same changes Rep. Pierce was able to complete in thirty minutes. The use of Rep. Pierce allowed Judge Nowlin to obtain the map of the new Districts 19 and 26, along with the statistical information, in time for his meeting with his fellow judges on the afternoon of

December 23. We also find that Rep. Pierce's involvement was limited to Districts 19 and 26 and that he had no input of any kind with respect to any other part of the redistricting plan in any other part of the State.

We are persuaded, however, that Judge Nowlin made a serious mistake in judgment when he asked Rep. Pierce to assist in making changes in a portion of the court's redistricting plan. Although Judge Nowlin reviewed and approved the changes Rep. Pierce made, Pierce, unfortunately, enjoyed latitude in deciding precisely what areas to move in the two Districts. Judge Nowlin gave no instructions to his law clerk, J.D. Munn, as to what changes should be made to Bexar County. Although Judge Nowlin's instructions to Rep. Pierce were general in nature, Pierce understood what Nowlin wanted him to do: move Alamo Heights and Terrell Hills from District 19 to District 26 and compensate District 19 by moving the adjacent areas of then District 26 (primarily Castle Hills) from District 26 into District 19. Both Judge Nowlin and Rep. Pierce must have realized that Pierce would need to engage in some trial and error exercises to accomplish this switch. This was the only way Rep. Pierce could achieve the required total population levels in the two districts and at the same time increase the minority voting population in District 19.

Judge Nowlin's conduct was inconsistent with the limitation of Judicial Canon 3A(4)[3] that prohibits ex parte

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3 Canon 3A. Adjudicative Responsibilities

communication with a party interested in pending litigation. Rep. Pierce obviously was someone with a potential and, as it developed, actual legal interest in the proceeding. Even if Rep. Pierce could have been considered a "disinterested expert," Judge Nowlin did not disclose his contact with Pierce to the parties, as required by Canon 3A(4). We stress that the "communication" between Judge Nowlin and Rep. Pierce was not the kind one normally contemplates in connection with this Canon. As we have previously indicated, there is no evidence that Judge Nowlin solicited or received any advice, as such, from Rep. Pierce with respect to the redistricting. We have also previously noted that the initiative for moving Alamo Heights and Terrell Hills came from Judge Nowlin, who requested Rep. Pierce to implement this change in much the same way that he might have instructed a law clerk. Nevertheless, we have also concluded that Rep. Pierce was afforded discretion in carrying out his charge, particularly with respect to compensating District 19 for the areas to be moved out. The end result of Rep. Pierce's efforts were then printed and thereafter "communicated" to Judge Nowlin via Mr. Munn.

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(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

This "communication" was then considered by Judge Nowlin and essentially incorporated into the final plan.

Judge Nowlin's conduct was also inconsistent with the admonitions of Canon 2A, which constrains a judge to avoid not just impropriety but also the "appearance of impropriety" in order to avoid erosion of public confidence through "irresponsible conduct by judges." Judge Nowlin should have realized that allowing Rep. Pierce to participate in drawing district lines would give a serious perception of impropriety. As a member of the legislative body being redistricted, Rep. Pierce had a keen interest in the process. Although Judge Nowlin was convinced that Rep. Pierce had no intention of being a candidate, Judge Nowlin had no way of knowing what rewards or punishments Pierce may have wanted to heap on his associates. The entire redistricting issue had generated intense partisan interest by December 23, 1991, as was inevitable. For a judge of the court panel faced with resolving this controversy to privately call upon an elected member of the legislature for assistance in that task, regardless of how limited, would clearly have the appearance of impropriety for any reasonable observer.

Judge Nowlin and his family have unfortunately suffered considerably from the public accusation of corruption and evil motive. As noted above, we find no foundation for these charges. We do conclude, however, that Judge Nowlin's unthinking ex parte contact with Rep. Pierce and allowing Rep. Pierce to play a role in this sensitive redistricting case amounts to conduct inconsistent with Canons 2A and 3A(4) and prejudicial to the effective administration of the business of the courts in violation of

28 U.S.C. § 372(c)(1). For these reasons, we recommend that the Council reprimand Judge Nowlin for his conduct and caution him to exercise greater care in such matters in the future.

Respectfully submitted,

Chief Judge Henry A. Politz
Judge W. Eugene Davis (Chairman)
Judge Harold R. DeMoss, Jr.
Judge William Wayne Justice
Judge George P. Kazen

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed July 21, 1992 at 1:34 p.m.

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	CIVIL NO. A-91-CA-428

ORDER

Judge James R. Nowlin hereby gives notice to the Chief Judge of the Fifth Circuit and all parties properly before the Three Judge Panel in the above numbered and styled causes that said Judge hereby sua sponte withdraws from further participation in the instant litigation. Although various allegations made by several parties in these cases have been widely publicized due to the highly partisan nature of the controversies and issues in said cases, this Judge has found no legitimate reason to recuse himself. Indeed, this Judge, despite considerable personal discomfort from publicized unfounded allegations, has maintained his participation in these cases primarily to discourage any precedent that would give credence to such charges or to set the stage in future litigation of whatever kind for dissatisfied or disgruntled parties to successfully remove a Judge from a case simply by efforts at creating

widespread controversy through out of court use of the media. This Judge is now concerned that because of the publicized negative personal comments made by several parties or their attorneys related to his participation in these matters a reasonable person might well conclude that the targeted Judge would maintain such bias and prejudice toward those parties or their attorneys making the comments or generating publicity that he could not henceforth be fair and impartial in considering future issues that might come before the Panel. This Judge has no animosity toward any party in these causes because of their conduct either in or out of court; nevertheless, a reasonable person knowing no more about these causes or publicity therein than what has over the past four months appeared in print or on the broadcast media might well assume some degree of manufactured bias.

It is of utmost importance that during the remainder of this litigation Panel members be unfettered in their ability to impose appropriate penalties and sanctions against attorneys or parties who conduct themselves in violation of the Rules. Imposition of Rule 11 sanctions for harassment, the filing of frivolous pleadings or penalties for other unprofessional conduct or behavior should be readily available to the Court. Proper administration of these elementary rules of conduct in the last days of these cases can best be achieved through the addition of a new Panel member whose actions could not be subject to the unjustified yet certain claim of retribution for the excesses of the past.

Additionally, the duties and obligations of serving as a Judge in this litigation as well as inquiries about generated publicity have hampered the orderly disposition of the Court's substantial pending criminal and civil dockets. The Supreme Court of the United States unanimously affirmed the Judgment of the Three Judge Panel on June 29, 1992. Richards, Gov. of Texas v. Terrazas, Louis, et al., No. 91-1270, 1992 U.S. LEXIS 4538, at *1 (U.S. June 29, 1992). As a Judge who takes pride in his past participation in the creation of interim relief that complies with the mandates of the Voting Rights Act, I leave the supervision of the remaining issues to another judge with determinations, patience, a less pressing docket, and fewer emergency obligations.

Already too much energy and effort have been expended in these cases on quests for protection or enhancement of partisan and personal interests. Scarce public funds have been utilized to vindicate ambition and the preservation of political power, all fleeting over time. Some involved must at some future time answer for their actions and motives to professional peers or at the ballot box. All of us will eventually be required to respond to an even higher Authority. The actions that this Judge has taken in these cases in an effort to apply the law to the facts presented leave him with a clear conscience at that final and most important roll call.

Although 28 U.S.C. § 2284(b)(1) provides that the district judge to whom the request for a three judge panel was presented shall serve as a member of the panel, this

requirement is not jurisdictional. See Hicks v. Miranda, 442 U.S. 332, 338 n.5 (1975).

28 U.S.C. § § 291(b), and 292(b) allow the Chief Judge of the Circuit to designate another circuit or district judge to hold Court within the circuit. 28 U.S.C. § 295 mandates that no designation or assignment of a circuit or district judge shall be made without the consent of the Chief Judge or judicial council or the circuit from which the judge is to be designated and assigned.

IT IS THEREFORE ORDERED that the Clerk of the Court shall send a copy of this Order to the Chief Judge of the Fifth Circuit as notice of the contents herein, so that another Judge may be designated to replace Judge Nowlin on the panel in the instant litigation.

SIGNED AND ENTERED this 21st day of July, 1992.

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

Filed July 21, 1992 at 4:21 p.m.

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	CIVIL NO. A-91-CA-428

ORDER

Having been advised that District Judge James R. Nowlin has this date formally withdrawn from further participation as a member of the three-judge court assigned to this litigation, as Chief Judge of the United States Court of Appeals for the Fifth Circuit I hereby designate and appoint Harry Lee Hudspeth, United States District Judge of the Western District of Texas, to replace Judge Nowlin and to assume all duties and responsibilities heretofore performed by Judge Nowlin on this court. The assignment is effective immediately.

Shreveport, Louisiana, this 21st day of July, 1992.

s/s
HENRY A. POLITZ
CHIEF JUDGE
UNITED STATES FIFTH CIRCUIT
COURT OF APPEALS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed July 27, 1992.

STATE OF TEXAS, et al.,	§	
	§	
vs.	§	Civil No. 91-2383
	§	(Stanley Sporkin)
UNITED STATES OF	§	
AMERICAN et al.	§	

MEMORANDUM OPINION

The State of Texas filed this suit seeking relief under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1988) ("section 5"). It originally asked this Court to preclear four of its newly enacted reapportionment plans. Questions involving preclearance for the plans governing elections to the Texas House, the Texas Board of Education and the United States Congress have since been resolved. Only the reapportionment plan for the Texas Senate remains at issue.

Reapportionment for the Texas Senate has been the subject of extensive litigation in both state and federal courts. See Texas v. United States, 785 F. Supp. 201, 202-203 (D.D.C. 1992). Several plans have been proposed or adopted by the legislature and the courts in the course of these law suits; however, this Court has previously determined that only two are relevant to this case. The first

is the plan that Texas is asking this Court to preclear: SB 1 which was enacted by a special session of the state legislature on January 8, 1992. The second is the plan that will serve as the benchmark for a section 5 preclearance analysis: the "Terrazas" plan which was ordered into effect for the primary elections by a three-judge federal court in Texas on December 24, 1991. See id.

On July 10, 1992, the State of Texas filed a motion for summary judgment asking the Court to declare SB 1 precleared. It also filed a motion to reconsider the order granting permissive intervention to Louis Terrazas, Tom Craddick, Ernest Angelo, and Robert A. Estrada ("Terrazas intervenors")[1] and a motion for judgment on the pleadings. The Terrazas intervenors simultaneously filed their own motion for summary judgment asking the Court to declare that SB 1 is not entitled to preclearance. Responses were filed on July 24, 1992. The Court has considered the

1 On March 19, 1992, the Court issued an order permitting two sets of individuals to intervene in the case pursuant to Fed. R. Civ. P. 24(b) "subject to further order of this Court." Texas v. United States, Civ. No. 91-2383, Order (Mar. 19, 1992). Austin Negrete and eight other individuals ("Negrete intervenors") comprise the first set. They favor preclearance of SB 1. The Terrazas intervenors are the second set. They oppose preclearance of SB 1.

The State of Texas has filed a motion to reconsider the Rule 24(b) intervention for the Terrazas intervenors. As noted by the United States, the Terrazas intervenors have only raised an issue of law in their motion for summary judgment and in their opposition to Texas's motion for summary judgment. Memorandum of the United States in Response to Plaintiff's Motion for Reconsideration of Rule 24(b) Intervention Order and for Judgment on the Pleadings, 1-2. Hence, their continued presence in the case will not result in any undue delay in reaching a final adjudication on the merits. Texas's motion to reconsider the intervention will be denied.

arguments of all the parties and is now prepared to rule on the motions.

I. SUMMARY JUDGMENT

Summary judgment may be granted where the Court finds that there is no genuine issue of material fact left to be resolved. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Fed. R. Civ. P. 56(c). Neither the moving party nor the opponent is required to submit affidavits or to point to other materials in the case to demonstrate that no genuine issue of material fact exists. However, a summary judgment motion may not be opposed by "the mere pleadings themselves." Celotex Corp., 477 U.S. at 324.

All parties agree, with one exception,[2] that there is no genuine issue of material fact in dispute in this case. See Responses of Defendant-Intervenors Louis Terrazas, et al. to Motions of Plaintiff State of Texas, 9; Defendant-Intervenor Negrete's Response to Plaintiff's Motion for Summary Judgment, 3; Memorandum of the United States in Response to Plaintiff's Motion for Summary Judgment, 1-2; Texas's Opposition to Terrazas Intervenors' Motion for Summary Judgment, 1 n. 2. However, they disagree over the relevance of particular facts. The Terrazas intervenors have not submitted any supporting materials in conjunction with their motion for summary judgment nor have they filed a statement of material facts which are not

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2 The State of Texas opposes the summary judgment motion of the Terrazas intervenors on the grounds that there is a material question of fact on the issue of whether SB 1 violates section 2. We disagree with the State that an issue of fact is raised; rather we see it as an issue of law whether the Texas court's decision established that SB 1 is a violation of section 2 at all. This will be discussed infra at 5-11.

in issue as required by the local rules of this Court. See Local Rule 108(h). Instead, the Terrazas intervenors merely state in their motion, "There is no genuine issue of material fact necessary to establish that SB 1 is not entitled to section 5 preclearance." They also oppose the State of Texas' motion for summary judgment on purely legal grounds. The Terrazas intervenors have staked their position entirely on the legal claim that this Court is bound by a statement of the three-judge court in Terrazas v. Slagle, Nos. 91-425, 91-426 (W.D. Tex., Jan. 10, 1992) declaring SB 1 in violation of section 2 of the Voting Rights Act. In sum, they argue that facts pertaining to the relative merits of SB 1 and the Terrazas plan are not material because the Court is legally compelled to conclude that SB 1 cannot meet the standards for preclearance.

The State of Texas does believe that there are material facts which must be found in order to grant judgment in its favor, but it believes those facts are not in dispute. In support of its motion for summary judgment, the State of Texas has submitted affidavits from experts attesting to the ability of their plan to meet the standards for section 5 preclearance. The United States has filed papers stating that it does not oppose Texas' motion for summary judgment; the Negrete intervenors have filed in support of it. No party has filed any affidavits or pointed to any interrogatories, documents or other factual items in the record to contest Texas' statement of facts. The Court will address both motions simultaneously because they present the same legal questions.

A. Legal Significance of the Statement by the Terrazas Court

On January 10, 1992, the Terrazas three-judge court issued an opinion denying a motion by the defendants in that case to modify or stay the judgment of December 24, 1991 ordering the court's own reapportionment plan into effect. Judge Garwood dissented. Near the end of the majority's opinion, the following statement appears:

> Until formal comment on the substitute Senate plan . . . has been made by the Department of Justice, elections cannot proceed under the Legislature's proposed plan as scheduled under current state law. Alternatively, should the opinion of the Department of Justice issue in the next few days, the Court has already reviewed testimony and other evidence on the Senate's substitute plan during the December hearings and finds it fails to satisfy the Sec. 2 requirements of the Voting Rights Act. Terrazas v. Slagle, Nos. 91-425, 91-426, sl. op. at 12 (W.D. Tex. Jan. 10, 1992).

The Terrazas intervenors claim that this Court is bound by this statement under the doctrine of collateral estoppel. See Connors v. Tanoma Mining Co., 953 F.2d 682, 684 (D.C. Cir. 1992); United States v. Sherman, 912 F.2d 907, 909 (7th Cir. 1990). The Court rejects this contention on several grounds.

Collateral estoppel applies where four conditions are met:

(1) There is identity of issues between the first and second proceedings.

(2) The issue was fully litigated in the first proceeding.

(3) The issue was essential to resolving the case in the first proceeding.

(4) The party against whom the earlier ruling is being applied was fully represented in the first proceeding.

Two of the four prerequisites are wholly missing in this case. The contingent and gratuitous statement by the Terrazas majority does not rise to the level of full adjudication on the merits of the section 2 validity of SB 1. The issue was not litigated in the Terrazas case. The three-judge court in Texas held a preliminary injunction hearing during which it reviewed the validity of the previously enacted plan, SB 31, not SB 1. In fact, the Terrazas court explicitly stated in its December 24, 1991 opinion that it did not consider the Quiroz/Mena plan, the substantive equivalent of SB 1, because at that time it had been declared procedurally invalid by the Texas Supreme Court.[3] Terrazas v. Slagle, Nos. 91-425, 91-426, sl. op. at 6-7 (Dec. 24, 1991). There was no full and fair adjudication of the merits of SB 1 or its identical predecessor, the Quiroz/Mena plan.

Indeed the "facts" that are cited in the January 10 opinion do not go to the question of section 2 viability at all, rather they concern section 5 issues. The Terrazas court compares its plan to the Quiroz/Mena plan, substantively the same as SB 1, and concludes that its plan provides a "greater opportunity" for minority citizens to elect

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[3] The parties agree that SB 1 and the Quiroz/Mena plan are substantively identical. The Quiroz/Mena plan was ordered into place by a Texas state court. The Texas Supreme Court then ruled that it was procedurally invalid. The Texas legislature then met in special session in the first week of January, 1992, in order to enact the Quiroz/Mena plan so that it would be legally effective.

representatives of their choosing. Sl. op. at 5, and that "minority voting rights can be enhanced to a greater degree than provided in a Quiroz-style plan." Sl. op. at 9. It claims that SB 1 is "an impermissibly partisan reaction to this Court's superior interim plan." Sl. op. at 6. None of these observations support the conclusion that SB 1 violates section 2. They only support the Terrazas court's conclusion that its plan is superior to the plan chosen by the Texas legislature.

Moreover, the January 10 statement declaring that SB 1 violates section 2 was not essential to a resolution of the issues raised in that case. At that point, the only question for the Terrazas court to decide was whether it should stay implementation of its own plan and allow the state to proceed with the preclearance process for SB 1 or instead require that the primary elections be held under the court-crafted plan. The court's statement about the Texas legislature's plan was posed "in the alternative" and was contingent upon an event that had not yet occurred. In deciding whether to stay the implementation of its own court-crafted plan, the Court did not need to consider whether SB 1 violated section 2. Judge Garwood made this point in his dissent where he suggested that the court stay implementation of its own plan, await a preclearance decision from the Department of Justice, and consider the section 2 issue only after SB 1 was precleared. The section 2 question would have been moot if the Department of Justice refused to preclear SB 1. The Terrazas majority itself says that its principal concern is delay and that "[I]t does not appear that preclearance of any substitute plans

can be obtained in a timely fashion so as to allow the 1992 primaries to proceed in March as provided by existing state law." Terrazas v. Slagle, Nos. 91-425, 91-426, sl. op. at 10 (W.D. Tex. Jan. 10, 1992). In sum, there was no need for the Terrazas court to rule on the section 2 issue in order to decide whether to stay the implementation of the court-ordered electoral plan.

The Terrazas intervenors also claim that the Supreme Court affirmed the section 2 statement by the Terrazas majority when it granted summary affirmance in the appeal filed by the State of Texas. They argue that Supreme Court affirmance made the decision of the Terrazas court including its . . . . sentence about SB 1 final and of "sufficient firmness to be accorded conclusive effect." Motion for Summary Judgment of Defendant-Intervenors Louis Terrazas, et al. 4, citing Interconnect Planning Corp. v. Feil, 774 F.2d 1132, 1135 (Fed. Cir. 1985). But, as the Department of Justice points out persuasively in its motion opposing summary judgment for the Terrazas plaintiffs, the Supreme Court did not affirm any specific statements of the Terrazas court.

> A summary disposition affirms only the judgment of the court below, and no more may be read into [the Supreme Court's] action than was essential to sustain that judgment. Statement of the United States Concerning Effect of Supreme Court Action citing Anderson v. Celebrezze, 460 U.S. 780, 785 n. 5 (1983).

A summary affirmance decides only the precise questions presented on appeal. See Mandel v. Bradley, 432 U.S. 173, 176 (1977). Given the questions presented in the appeal

from the Terrazas decision,[4] the summary affirmance verifies only that Terrazas court was correct in denying a stay under the circumstances that existed on January 10, i.e. before the newly legislated plan, SB 1, had been precleared and at a time when it appeared that waiting for preclearance would cause delay harmful to the electoral process.

Under the doctrine of collateral estoppel, this Court is not bound by the statement of the Terrazas court in its January 10 opinion declaring that SB 1 violates section 2. The issue was not fully litigated by the Terrazas court, and a decision on the section 2 question was not essential to the issue that court had to resolve in its January 10 opinion. When making decisions about the validity of legislative policies under the Voting Rights Act, Courts are required to make detailed factual findings. As the Fifth Circuit itself has said,

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning. Cross v. Baxter, 604 F.2d 875, 879 (5th Cir. 1979) (citations omitted), vacated on other grounds, 704 F.2d 143 (5th Cir. 1983); see also Westwego Citizens for Better Government v. Westwego, 872 F.2d 1201, 1203 (5th Cir. 1989); Velasquez v. City of Abilene, 725 F.2d 1017, 1020 (5th Cir. 1984).

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4 The jurisdictional statement filed by the State of Texas presented the following questions:

> 1. May a local three-judge federal district court acting under section 5 of the Voting Rights Act substitute a court-crafted redistricting plan for a legislatively approved plan that obtained section 5 preclearance from the United States Department of Justice?
>
> 2. Does preclearance from the United States Department of Justice establish prima facie validity of a redistricting plan so as to preclude interim injunctive relief under section 2 of the Voting Rights Act absent extreme and unique circumstances?

In our view, the Terrazas majority did not adhere to this directive. It made a blanket statement without factual underpinnings or explanation about the section 2 invalidity of SB 1. While expressing clearly its preference for its own plan over the plan enacted by the legislature the Terrazas court failed to substantiate in any way its legal objections to the legislature's plan, instead relying principally on practical considerations like delay in reaching its decision.[5] Thus, we must take the statement for what it is worth, in its context and barren of specific factual findings.[6] Since the Terrazas intervenors st[illegible]heir motion for summary judgment entirely on the proposition that the court is bound by the Terrazas court's statement that SB 1 violates section 2, their motion fails by necessity and, accordingly, will be denied.

B. Preclearance of SB 1

In order to grant preclearance to a reapportionment plan a court must make two findings. First, the plan may not be retrogressive in terms of minority voting rights when

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5 The Fifth Circuit has also made clear that legislatively enacted plans are preferable to court-imposed plans except in the most unusual of circumstances. See Seastrunk v. Burns, 772 F.2d 143 (5th Cir. 1985).

6 We note also that Judge Nowlin has since recused himself from any further participation in the case.

compared to the plan that would be in effect were the plan in question not approved. See Beer v. United States, 425 U.S. 130, 141 (1976). As noted above, SB 1 is the plan in question, and the plan that would be in effect, the benchmark, is the Terrazas plan. See Texas v. United States, 785 F.Supp. 201 (D.D.C. 1992). Second, discriminatory purpose may not be a motivating factor in the selection of the plan. See City of Richmond v. United States, 422 U.S. 358, 378 (1975). As an initial matter, we note that the Department of Justice has posed no objection to SB 1. See Notice of Filing of Section 5 Determination (July 21, 1992). Were it not for the presence of the intervenors in this litigation, there would be no dispute. However, given the unusual posture of this case, the Court will proceed to rule on Texas' motion.

The State of Texas has submitted detailed affidavits to prove that SB 1 meets the nonretrogression standard. Lynn Moak and Allan Lichtman are both experts in data analysis and redistricting. Mr. Moak performed a thorough comparison of SB 1 and the Terrazas plan. Mr. Lichtman then verified the accuracy and reliability of Mr. Moak's work. Mr. Moak concluded that SB 1 increases the number of districts in which minorities can elect candidates of their own choosing from eight to nine. It creates an additional Hispanic district as compared to the Terrazas plan. Review of recent primary election voting data also revealed "major differences . . . in the pattern of Black and Hispanic support." Affidavit of Lynn Moak, Motion for Summary Judgment, 3. He concluded that because of this phenomenon "mixed minority" districts would not actually

work and could not be considered minority districts. As a result, two of the districts identified in the Terrazas plan as minority districts and one of the districts identified in SB 1 as a minority district failed to qualify as minority districts under the standards of Mr. Moak's analysis. In District 13 in Harris County, SB 1's version does have a reduced African-American voting age population, however, Mr. Moak's regression model indicates that African-American voters will still be able to elect representatives of their choice. Also, the modification in District 13 allow for the creation of District 6 which will be a Hispanic district and allow for the possibility that District 15 may also become an African-American district.

Having reviewed Mr. Moak's work as well as the affidavit of Professor Lichtman who confirms that Mr. Moak's methodology is well-grounded in the literature and consistent with the methodology he uses in work for the Department of Justice, the Court credits these statements and adopts Mr. Moak's affidavit as its findings of fact.

As for the questions of discriminatory purpose, Texas has submitted the affidavits of seven state senators and representatives who participated in the creation and passage of SB 1.[7] Six of these officeholders are themselves African American or Hispanic. The seventh is the Dean of the Texas Senate. All of these individuals gave sworn statements affirming that there was no discriminatory

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7 The individuals submitting affidavits are Senator Gonzalo Barrientos, Senator Chet Brooks, Senator Rodney Ellis, Senator Eddie Bernice Johnson, Senator Judith Zaffirini, Representative Eddie Cavazos, and Representative Roman Martinez.

purpose behind SB 1. All of them note that SB 1 is endorsed by the majority minority organizations[8] in Texas. The Court credits these statements finds that there is no discriminatory purpose underlying SB 1.

The Terrazas intervenors, the only remaining party that opposes Texas' motion for summary judgment, have not filed any affidavits or other materials to raise a genuine issue of material fact. They rest on the same legal argument that they made in their own motion for summary judgment and point only to the statement of the Terrazas court in its January 10 opinion as the basis for their claim that there is a genuine triable issue concerning motive remaining in this case. The Court has already rejected this argument. We are not bound by the Terrazas court's statement, and it does not, without more, raise a genuine issue of material fact. The statement of the Terrazas court is conclusory only, and it is not accompanied by any specific references to testimony, evidence of personal knowledge. See Memorandum of the United States in Response to Motion for Summary Judgment of Defendant-Intervenors Terrazas, et al, 6 n. 3. Texas has offered the carefully researched opinion of experts, and the Terrazas intervenors have presented neither witnesses nor documents that would be able to contradict them.

Accordingly, the Court will grant Texas' motion for summary judgment and will grant preclearance to SB 1 under section 5 of the Voting Rights Act.

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8 As the phrase implies, a "majority minority organization" is one where the majority of the members of the organization are also members of a minority group. The NAACP would be an example.

Date:
07/27/92

s/s
Patricia M. Wald
United States Court of Appeals

s/s
Joyce Hens Green
United States District Court

s/s
Stanley Sporkin
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed July 27, 1992.

STATE OF TEXAS, et al.,	§	
	§	
vs.	§	Civil No. 91-2383
	§	(Stanley Sporkin)
UNITED STATES OF	§	
AMERICAN et al.	§	

ORDER

For the reason given in the foregoing opinion, it is this 27th day of July, 1992, hereby

ORDERED that the motion by Louis Terrazas, Tom Craddick, and for summary judgment is denied: and it is

FURTHER ORDERED that the motion by the State of Texas to reconsider the decision to allow the Terrazas parties to intervene in the case is denied; and it is

FURTHER ORDERED that the motion by the State of Texas for summary judgment is granted.

It is hereby DECLARED that SB 1 does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, nor is SB 1 in contravention of the guarantees set forth in 42 U.S.C. § 1973b (f) (2).

s/s
Patricia M. Wald
United States Court of Appeals

s/s
Joyce Hens Green
United States District Court

s/s
Stanley Sporkin
United States District Court

AFFIDAVIT

STATE OF TEXAS|
COUNTY OF TRAVIS|

1.0 Introduction. The purpose of this affidavit is to present an analysis of two Texas State Plans. The first of these is current plan which was established by interim court order in the case of Terrazas v. Slagle (Civil No. A-91-CA-425, 426, & 428). The second plan is that enacted by the State of Texas under the provisions of Senate Bill 1, 3rd Called Session, 72nd Legislature. The current plan was analyzed in state computer systems as Plan S567. The state plan was analyzed as Plan S560. The state plan is identical to that originally precleared by the U.S. Justice Department as the Mena/Quiroz Settlement Plan. Copies of maps and summary data analysis for each districts are attached as Moak Exhibits 3 and 4 to this Affidavit.

1.1 Background. My name is Lynn M. Moak and I am a private consultant on matters pertaining to data analysis including but not limited to the field of redistricting. I have been qualified before state and federal courts as an expert in redistricting, data analysis, and political analysis with reference to Texas cases involving legislative and congressional redistricting in 1981 and 1992. In addition, I have been qualified as an expert witness in state court onmatters pertaining to governmental and public school finance analysis. In addition, I have been appointed as a

court expert in the continuing Texas litigation relating to the financing of Texas public school education.

1.2 Professionally, I have served in a variety of positions in Texas state government over the period 1966-1991 including Assistant Comptroller for Planning and Research (1975-76), Director of Research for the Office of Lieutenant Governor (1977-1982), Director of Redistricting for the Texas Senate (1979-1982), and Deputy Commissioner for Research and Development of the Texas Education Agency (1986-1992). I have also been a private consultant in the field of governmental research and currently am President of Moak Consulting which specializes in financial consulting with Texas school districts. I have a Bachelors Degree in Government and am enrolled in a Doctoral Program in Educational Administration at the University of Texas as Austin. I reside at 615 W. 35th St., Austin, TX 78705. A copy of my resume is attached as Exhibit Moak 1.

1.3 For the past year, I have worked with the Office of Texas Attorney General Dan Morales to analyze of a variety of redistricting plans related to congressional and Texas Legislative Districts. In this connection, I have had access to given direction to the resources and staff of that department including computer modelling, data analysis, and election data analysis. The conclusions reached in this analysis are derived from that effort.

1.4 I have been asked to undertake a comparative analysis of the court plan of the Texas Senate and of the state plan adoped by the State in January 1992 with respect to the impact of these plans on the opportunities of Hispanics and Blacks to elect representatives of their choice. The current plan was imposed by court order. The proposed plan was adopted by the legislative enactment. The affidavit contains the summary results of that analysis. Additional detailed statistical analysis is available based on the application of the computerized models to all districts and a variety of elections districts. The additional data supports and confirms the information presented herein.

2.0 Summary. The state plan adopted as Senate Bill 1 does not reduce the ability of the Blacks and Hispanics to elect candidates of their choice but rather increases the number of districts in which minorities are able to elect candidates of their choice from eight to nine. In addition, the plan improves upon prior plans including the previous state plan upon which elections were conducted from 1984 to 1990 by increasing the number of minority districts. This information is presented in Table 1 "Summary of Results of Texas Senatorial Plan Comparison."

TABLE 1 SUMMARY OF RESULTS OF TEXAS SENATORIAL PLAN COMPARISON

AREA/DISTRICT	COURT DISTRICTS	STATE DISTRICTS
1. DISTRICTS OF MINORITY CHOICE	8	9
-BLACK	2	2
-HISPANIC	6	7
HOUSTON AREA		
DISTRICT 13-% BLACK VAP	57.20%	50.30%
DISTRICT 15/6-% HISPANIC VAP	51.60% (insufficient)	57.10%
DALLAS AREA		
DISTRICT 23-% BLACK VAP	46.00%	46.30%
SAN ANTONIO AREA		
DISTRICT 19/26-% HISPANIC VAP	56.30%	59.80%
DISTRICT 24/19-% HISPANIC VAP	54.20%	58.20%
CORPUS CHRISTI AREA		
DISTRICT 20-% HISPANIC VAP	57.90%	57.10%
SOUTHWEST TX. AREA		
DISTRICT 21-% HISPANIC VAP	76.90%	78.60%
RIO GRANDE VALLEY AREA		
DISTRICT 27-% HISPANIC VAP	76.90%	78.60%
EL PASO AREA		
DISTRICT 29-% HISPANIC VAP	67.10%	67.30%

3.0 Methodology. The comparison of the two plans combined analyses of population, voting age population, voter registration and election results over the period 1986-1992, including the 1992 Democratic primary elections which concluded on April 14, 1992. This data was further analyzed using a series of regression based equations developed in concert with data analysis experts of the Texas Office of Attorney General. This model used a double equation approach for the development of estimates of Hispanic, Black, and Anglo voter turnout, participation, and voter choice. A technical description of the model is presented in Exhibit Moak 2. Through this model estimates have been developed for a variety of elections over the time period 1986-1992. These elections included statewide races, the party primary, and general elections level as well as local contests. The analysis was conducted over a period of months and relied upon the nationally recognized expertise of Dr. Allan Lichtman. The original data was processed by the Texas Legislative Council in the development of a statewide redistricting system which has been used by all parties in the development of potential redistricting plans.

3.1 The nine districts in each plan shown on Table 1 with 45 percent or more of a single minority were initially considered. Population data from the balance of the state was examined to determine if additional minority districts could have been created. No such concentrations were located in either plan. Election data for 14 statewide races

involving a minority candidate and a variety of local races was then used to determine the potential impact of voter behavior as expressed through registration, turnout and candidate choice. As a result, eight of the nine districts in the court plan were classified as minority choice districts. Under the state plan all nine of the districts were classified as minority choice districts. The treatment of a new Hispanic district in Houston constituted the major difference between the two plans.

3.2 Two additional districts were analyzed. These districts each had combined minority voting age of less than fifty percent and individual minority voting age populations of less than 30 percent. This analysis revealed no significant potential for the election of a minority choice candidate in either district. Critical to this analysis was the absence of consistent coalition voting which is considered below. Under this analysis no pattern of dependable coalition voting among the two minority groups was found in either non-partisan or Democratic Party primary elections in the affected counties.

4.0 Key Research Findings Two key historical trends were derived from the election analysis and were used in the determination of the electability of minority choice candidates. Each of these related to minority group voting behavior. First, the ten districts analyzed in each plan all displayed a predominant Democratic Party election preference regardless of the race of the candidate in general elections in 1988 and 1990. In 1990, nine statewide races

were identified in which a high degree of competition was present. Under the current plan, Democratic candidates won all nine elections in nine districts and eight of nine in the other. Under the proposed plan all ten districts featured Democratic sweeps of the identified contests. Nomination by the Democratic Party in each of these districts leads directly in election in most cases. This result underlined the importance of a major review of Democratic Party primary elections.

4.1 The review of the Democratic Party primary elections in the affected counties reveals a clear and increasing lack of coalition voting in elections in Harris, Dallas and, to a lesser extent, Tarrant County. In each of these cases a substantial number of local contests were found in which major differences were observed in the pattern of Black and Hispanic support. This observation leads directly to the conclusion that the concept of "mixed minority" districts is not appropriate for application to Texas districts in these counties other than in terms of the analysis of general election contests. This condition led directly to the failure to classify three districts classified as minority choice districts. Districts 12 and 15 in the court plan and District 15 in the state plan were the subjects of this additional review. The regression model, extreme case analysis and grouped precinct analysis confirmed this result. Table 2: "Estimated Voting Preferences of Black and Hispanic Voters in Selected Election Contests in Three Texas Counties" presents a summary of the results which led to this

conclusion. Unless noted all of the contests were based on full county data.

Table 2 Estimated Voting Preferences of Black and Hispanic Voters in Selected Election Contests in Three Texas Counties

ELECTION	YEAR/TYPE	EST. % BLACK VOTE FOR MINORITY CANDIDATE	EST. % HISPANIC VOTE FOR MINORITY CANDIDATE
1. HARRIS COUNT (HOUSTON)			
177TH DISTRICT JUDGE	1988 DEM. PRI	51	19
215TH DISTRICT JUDGE	1988 DEM. PRI	88	34
STATE TREASURER	1990 DEM. PRI	10	65
55TH DISTRICT JUDGE	1990 DEM. PRI	67	33
CRIM. APPEALS CT.	1992 DEM. PRI	69	18
STATE SENATE (DIST. ONLY)	1992 DEM. PRI	9	100
2. DALLAS COUNTY			
DISTRICT ATTORNEY	1986 DEM. PRI	89	0
TREASURER (STATE)	1990 DEM. PRI	38	74

CT OF CRIM APPEALS	1992 DEM. PRI	90	0
RAILROAD COMM.	1992 DEM. PRI	59	100
3. TARRANT			
CT OF CRIM APPEALS	1990 DEM PRI	61	41
STATE TREASURER	1990 DEM PRI.	32	66
SHERIFF	1992 DEM. PRI	43	98
CT. OF CRIM APPEALS	1992 DEM. PRI	88	60

5.0 Harris County - Hispanic District. The major improvement of the state plan over that of the court imposed plan is found in the "Hispanic" district of Harris County. Regardless of the measure employed, the state plan provides a superior opportunity for the Hispanic community to elect a candidate of their choice. Further, given the results of two 1992 Democratic Primary elections within the current District 15 in which the overwhelming choice of the Hispanic community was defeated, it is clear that improvement is needed in this district as configured by the court to ensure the selection of a candidate of minority choice. The state plan adopted by the legislature affords that choice.

5.1 Overall, the two configurations are similar. Of the 512,391 persons living in the proposed District 6,425,982 or 83 percent live in the current district 15. Of the total Hispanic population of the proposed district of 320,716,283,250 live in the current District 15. The

political pattern of either district will favor the Democratic Party candidate. For the 1988 and 1990 general elections, for instance, the Democratic candidate won in 28 of 28 statewide elections in both versions. As indicated above, no reliable coalition exists between the three racial /ethnic groups represented in the community. For instance, in the 1991 election for Mayor of Houston, a black candidate is estimated to have received little or no support from either the Anglo or Hispanic communities within District 15 while in the 1992 Democratic Primary for District 15, the Hispanic candidate received little or no support from either the Anglo or Black communities.

5.2 As a result of the foregoing, the analysis of the two configurations must concentrate on the Democratic primary election as the key decision point in either configuration for the determination of the potential of the Hispanic Community to elect a candidate of their choice. The table below compares the two districts on critical variables.

Table 3: COMPARISON OF SELECTED VARIABLES BETWEEN THE CURRENT DISTRICT 15 AND THE PROPOSED DISTRICT 6

VARIABLE	CURRENT DISTRICT 15	PROPOSED DISTRICT 6	PROPOSED-CURRENT
1. TOTAL POPUL.	528,584	512,391	-16,193
2. VOTING AGE POPUL.	361,135	344,481	-16,654

3. % HISPANIC POPUL.	57.1%	62.6%	+ 5.5
4. % HISPANIC VOTING AGE POPUL.	51.6%	57.1%	+ 5.5
5. % SPANISH SURNAME REG. VOTERS	26.0%	31.6%	+ 5.6%
6. EST. HISPANIC % OF 1990 PRIM. VOTE	34%	58%	+ 24%
7. EST. HISPANIC % OF 1992 PRIM. VOTE	47%	72%	+ 25%
8. EST. HISPANIC % OF 1990 GENERAL ELECTION VOTE	19%	36%	+ 17%
9. % OF VOTES FOR MORALES (1990 DEM. PRI.)	56%	58%	+ 2%
10. % VOTE FOR GUERRERO (1992 D.P.)	68%	71%	+ 3%
11. % VOTE FOR MARTINEZ (1992 DEM. PRI.)	49%	EST. 53%	+ 4%

5.3 The significance of general election analyses is supported and strengthened by the outcome of the 1992 Democratic Party primary and runoff for District 15. In the first election, the Hispanic candidate Martinez received 48.9% of the vote including virtually all of the Hispanic vote, 24% of the Anglo vote and 9 percent of the Black vote according to the estimates produced by the election analysis model. In the runoff, the Hispanic candidate received virtually all of the Hispanic vote and little or no support from the other two communities. The second attempt garnered 48% of the total vote. The results of this election could clearly have been different if the proposed plan had been in place. For the portion of the districts which overlap, the Hispanic candidate received 59 percent of the vote. With the addition of the remaining 17 percent of the district, this level should have dropped to no less than 53 percent of the district vote.

6.0 Harris County - The Black District. Each plan provides a district within the Houston area in which the black community may elect a candidate of their choice. District 13, which has elected a Black Senator for the past ten years, contains a majority of black voting age population in each plan. The current plan establishes a level of 57.2% compared to the proposed plan percentage of 50.3%.

6.1 As shown in Table 1, the percentage of Black voting age population is reduced under the state plan when compared to the state plan. This reduction does not impact the ability of the Black community to elect a candidate of their choice.

As indicated in Table 3 below, the Black community has sufficient strength under the state plan in the Democratic Primary to control the election results according the results of the regression model. When the overwhelmingly Democratic Party dominance of this district is taken into account, control of the primary election process translates into electoral control of this district by the Black community. The modification in District 13 additionally permits the modifications necessary to the creation of District 6 above and to District 15 in Harris County. With the significant base of over 25% Black voting age population and a significantly higher share of the Democratic Party primary vote, District 15 may well develop into a second Black District for Harris County. The following table compares key statistics for the two versions of District 13. The participation estimates are based on the most conservative result of several available.

Table 4 Comparison of Selected Characteristics of District

Variable	Court	State
% Black VAP	57.2%	50.3%
Est. Black Vote-1990 Dem Pri	88%	72%
Est. Black Vote-1992 Dem Pri	87%	71%
Est. Black Vote-1990 General	70%	50%

7.0 Dallas County - The Black District. District 23 is classified as a minority district in each plan despite a level of black voting age population of less than 50 percent. The

rationale for this conclusion lies in the strong level of black voter participation at both the general election and democratic primary election levels. The following table portrays the results of this comparison.

Table 5 Comparison of Selected Characteristics of District

Variable	Court	State
% Black VAP	46.0%	46.3%
Est. Black Vote-1990 Dem Pri	78%	76%
Est. Black Vote-1992 Dem Pri	72%	73%
Est. Black Vote-1990 General	61%	54%

8.0 Other Districts In all other districts classified as minority, the state plan represents a realignment of geography rather than a major change in the ability of the Hispanic minority to elect a candidate of their choice. In five of the six districts relative Hispanic strength is increased as seen on Table 1 above. In the remaining district the decrease is only .8% and does not impact the ability of the minority community to elect a candidate of choice. In the case of all six districts under either plan, there is significant evidence that a cohesive Hispanic community will continue to elect the candidate of choice. Exceptions will occur when the Hispanic Community is not cohesive such as in the case of District 29 (El Paso) where a division in the Hispanic community has permitted the election of a candidate who is not the choice of the majority

of the Hispanic community. This applies to either version of District 29.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 9th day of July, 1992.

s/s
Lynn M. Moak, Affiant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed August 21, 1992 at 11:54 p.m.

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-426
	§	
BOB SLAGLE, et al.	§	

ORDER AND REASON

Before the Court is the motion of plaintiffs, Louis Terrazas, *et al.*, filed August 7, 1992, to enforce the prior orders of this Court filed herein December 24, 1991 and January 10, 1992, as amended January 13, 1992, respecting the Texas Senate redistricting plan to be implemented for the 1992 elections, and to require defendant John Hannah, Jr. (Hannah), the Secretary of State of Texas, to rescind the directions and instructions that he issued August 6, 1992, regarding the 1992 Texas Senate elections, and to prevent defendants Bob Slagle (Slagle), Chairman of the Democratic Party of Texas, and Fred Meyer (Meyer), Chairman of the Republican Party of Texas, and all acting in concert with them, from complying with or carrying out Hannah's said directions and instructions. Also before the Court are similar motions filed by plaintiff-intervenor David Sibley and by plaintiff-

intervenor Bill Sims. Responses to plaintiffs' said motion have been filed by Slagle and, jointly, by Hannah and defendants the Governor and Attorney General of Texas (herein collectively the "state" or "state defendants"). The United State Department of Justice as, with leave of Court, appeared and filed an *amicus* brief. After due notice, this Court held a hearing and received evidence and argument on said motions on August 17, 1992, and, having taken the matter under advisement, now issues this its order and judgment herein.

This Court's December 24 order was issued in this cause and in consolidated causes numbers A-91-CA-425, regarding the Texas House of Representatives redistricting, and A-91-CA-428, regarding redistricting of Texas Congressional Districts, and followed an approximately four-day hearing that began December 10, 1992. This Court denied interim relief in No. 428. As to the Texas House and Senate, this Court had before it and considered, as to each body, redistricting plans passed in 1991 at the regular session of the 72nd Texas Legislature (H.B. 150 for the House; S.B. 31 for the Senate) that had not been precleared under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, plans submitted by the plaintiffs, and plans that had been ordered pursuant to settlements in state court suits (*Mena v. Richards*; *Quiroz v. Richards*) in Hidalgo County, Texas, and that, as to the Senate ("*Quiroz*" plan), had been precleared by the United State Department of Justice in November 1991 but had been invalidated on procedural grounds by the Texas Supreme Court on December 17, 1991. *Terrazas v. Ramirez*, 829 S.W.2d 712

(Tex. 1991). The Court's December 24 order recites "[b]efore the Court is plaintiffs' motion for implementation of interim plan filed in cause No. A-91-Ca-425 on November 14, 1991; plaintiffs' request for implementation of interim plan filed in cause number A-91-CA-426 on November 27, 1991; . . . . " This Court ordered into effect its own "interim state legislative redistricting plan" for the House and Senate each "to provide for the holding of elections in Texas without delay and in accordance with existing state law," and decreed, among other things, as follows:

> " . . . it is the Judgment of this Court that the 1992 primary elections proceed as follows:
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-428 is DENIED, and that elections should proceed on an interim basis under the congressional plan as drawn in . . . [the 1991 state legislative fixing congressional district];
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-426 is GRANTED, and that primary elections for the Texas Senate will be conducted under this Court's interim plan attached as Appendix A to this Judgment;
>
> IT IS FURTHER ORDER, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-425 is GRANTED, and that primary elections for the Texas House of Representatives be conducted under this Court's interim plan attached as Appendix B to this Judgment;
>
> IT IF FURTHER ORDERED, ADJUDGED AND DECREED that the candidate filing deadlines for the

1992 primary elections are extended to January 10, 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residency requirement for candidates to the Texas Senate, and Texas House of Representatives are hereby waived for elections held under the State House and State Senate interim plans in 1992."

The 72nd Texas Legislature convened its third called session on January 2, 1992, and adjourned on January 8, 1992. During this session the legislature passed a bill (H.B. 1) redistricting the Texas House "beginning with the election of the 74th legislature" (the 1994 elections), but no legislation was enacted respecting House redistricting for the 1992 elections. Also passed was a bill (H.B. 2) rescheduling all the primary elections for April 11, 1992.[1]

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1 H.B. 2 also included the following provision:

"SECTION 8. NOMINATION BY EXECUTIVE COMMITTEE.

(a) If a redistricting plan for either house of the legislature is to be effective for the 1992 general election for state and county officers and that plan is different form the plan used in the 1992 primary elections, and if a political party has no nominee for a particular office under the new plan, the political party's appropriate executive committee may nominate a candidate to appear on the general election ballot for that office. This subsection does not apply to an office the district of which office the district of which includes the same territory under the new plan as it did under the plan used in the 1992 primaries.

(b) The secretary of state shall prescribe the procedures necessary to implement this section."

As this bill did not receive a two-thirds vote, it could not be effective, under Tex. Const. art. III § 39, until ninety days after adjournment, or April 8, 1992. Finally, the legislature passed on January 8 a bill (S.B. 1) redistricting the Texas Senate, stating that it "takes effect beginning with the election of the 73rd Legislature," *i.e.*, beginning with the 1992 elections. However, this bill did not receive a two-thirds vote, and hence it, too, was not effective until April 8, 1992. The senatorial districts provided for in S.B. 1 are the same as those in the *Quiroz* plan.

On January 9, 1992, the state defendants filed a motion to modify or vacate this Court's December 24, 1991 order in respect to the House and Senate. The state's said motion (as well as its motion to modify or stay filed December 31, 1991) was denied in our January 10, 1992 order. A principal contention of the state was that the S.B. 1 plan should be used for the Senate, that it had been in effect precleared because it was identical to the *Quiroz* Senate plan that had been precleared in November 1991, and that even if further preclearance were required that could likely be achieved in time for the primaries to take effect for the April 11, 1992 primary date specified in H.B. 2. The state defendants also requested that the House districts specified in H.B. 1 (which were the same as those of the *Mena* settlement) be used for the 1992 elections.

The United States of Justice on March 10, 1992, denied the state's request for preclearance of this provision under section 5 of the Voting Rights Act.

In denying relief, this Court's January 10 order states in part:

> "In the present case, this Court's December 24, 1991 judgment does no more than provide for the holding of 1992 elections as scheduled under Court-ordered interim plans that temporarily address voting rights deficiencies in the plans passed by the Texas Legislature. In denying the stay, this Curt in no way intends to limit the efforts of the Legislature in adopting acceptable permanent plans at any time it sees fit. Early in this second called Session, the Texas House approved this Court's interim plan redistricting that body for the 1992 primary elections, and fashioned a substitute permanent plan to be implemented for the 1994 elections. The Texas House indicated it approved the Court plan in order to guarantee that the elections go forward as presently scheduled."

The January 10 order also states:

> " . . . this substitute plan ("S.B. 1") adopted by the Legislature is identical to the one submitted by the parties in the *Quiroz* case in Hidalgo County. That "Quiroz plan" was before this Court during the period in which it reviewed SB 31, found that law in violation of the Voting Rights Act, and drafted its interim plan. Had this Court believed that the "Quiroz plan" better addressed the interest of minority voters its plan would have more closely mirrored the Senate districts drawn by the parties in Quiroz.
>
> A detailed comparison of the Court's interim plan with the "Quiroz plan" reveals that the Court's plan, and not Quiroz , provides a greater opportunity for all minority citizens of the State of Texas to elect representatives of their choosing.
>
> . . . .
>
> Until formal comment on the substitute Senate plan ("Quiroz plan") has been made by the Department of Justice, elections cannot proceed under the Legislature's proposed plan [S.B. 1] as scheduled under current state law. Alternatively, should the opinion of the Department of Justice issue in the next few days, this Court has already reviewed testimony and other evidence on the Senate's substitute plan during the December hearings and finds it fails to satisfy the Sec. 2 requirements of the Voting Rights Act."

The January 10 Order concluded by stating:

> "ACCORDINGLY IT IS ORDERED, ADJUDGED AND DECREED that the State Defendants' Motion to Stay is in all things DENIED, and that the 1992 primary elections proceed as presently scheduled under state law, with an elections date of March 10, 1992;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that primary elections for the Texas Senate and Texas House of Representatives be conducted under this Court's interim plans attached as Appendices A and B to this Court's Judgment entered December 24, 1991;
>
> IT IS FURTHER ORDERED that the candidate filing deadlines for the 1992 primary elections to all offices remains January 10, 1992."

The primary elections for the Texas Senate and House (as well as other offices) were held March 10, 1992, according to this Court's aforesaid order and in the districts established thereby, as were also the subsequent run-off primaries in April 1992. The nominees of the parties for the 1992 general election for the Senate (and other offices) were thus selected.

The state defendants appealed this Court's December 24, 1991 and January 10, 1992 orders to the United States

Supreme Court, and also made requests to that Court for a stay of those orders. All the requests for stay were denied. *See Richards v. Terrazas*, 112 S.Ct. 924 (No. A-498, January 16, 1992); *Richards v. Terrazas*, 112 S.Ct. 1073 (No. 91-1270, February 15, 1992). *See also Richards v. Terrazas*, 112 S.Ct. 1157 (NO. 91-1270, February 24, 1992; denying motion of appellants to expedite); *Richards v. Terrazas*, 112 S.Ct. 2272 (No. 91-1270, May 26, 1992; denying motion of plaintiffs in *Mena* state suit to intervene). On June 29, 1992, the Supreme Court in the state's appeal entered its order stating that "The judgment is affirmed." *Richards v. Terrazas*, 112 S.Ct. 3019 (No. 91-1270).[2] That is clearly a judgment on the merits.

On July 27, 1992, the United States District Court for the District of Columbia issued its opinion and order in its cause No. 91-2383, *State of Texas v. United States*, which was a suit brought by the state pursuant to section 5 of the Voting Rights Act to preclear legislative redistricting plans, in which the state sought, *inter alia*, to preclear that of S.B. 1. The plaintiffs in the present case (Terrazas, et al.) were permitted to intervene. The state filed a motion for summary judgment supported by affidavits; the motion was opposed only by the parties Terrazas, and they did so solely on the basis that the statement in this Court's January 10 order that S.B. 1 violated section 2 of the Voting Rights Act

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2 We are informed that defendant Slagle also took a separate appeal, which apparently has been docketed in the Supreme Court as *Slagle v. Terrazas*, No. 91-1546, and that the Supreme Court has taken no action on the jurisdictional statement therein. On February 19, 1992, the Supreme Court denied Slagle's request for stay pending appeal. *Slagle v. Terrazas*, 112 S.Ct. 1075 (No. A-599).

(42 U.S.C. § 1973) collaterally estopped the state from contending otherwise. The District of Columbia Court rejected the collateral estoppel argument, on the basis that the statement relied on was not necessary to this Court's decision, and, on the basis of the state's unrebutted affidavits, concluded that the districts as provided for in S.B. 1 were more favorable to minority voters than those provided for in this Court's plan. The court thus rendered judgment granting preclearance to the S.B. 1 redistricting plan under section 5 of the Voting Rights Act.[3]

On August 6, 1992, defendant Hannah promulgated the directive at issue here.[4] In essence it directs that:

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3 We are not informed as to whether or not that judgment has become final and appealable or, if so, whether it has been appealed.

4 It is entitled "Directive," dated August 6, 1992, from Hannah, as Texas Secretary of State, and is addressed "To: County Clerks, Voters Registers, Election Administrators, Party Officials." Its text states:

> "This Directive is issued pursuant to my authority as Chief Election Officer of the State of Texas and under Sections 31.001, 31.003, 31.004, and 31.005 of the Texas Election Code. All matters in this Directive pertain to the 1992 General Election for State and County Officers.
>
> 1. The election for the Texas Senate on November 3, 1992, shall be held pursuant to Senate Bill 1, 72nd Legislature, 3rd Called Session, 1992 (hereinafter referred to as "S.B. 1")
>
> 2. The candidates who received the nominations of their respective parties for Texas Senate in the 1992 primary elections will be the nominees for the same numbered Senate Districts in November, 1992, under S.B. 1.
>
> 3. Upon the request of a nominee for the Texas Senate who does not reside in the in the Senate District, under S.B.1, for which he or she was nominated in the primary

(1) the 1992 general elections for the Texas Senate shall be held in the districts established by S.B. 1, rather than in those established by this Court's prior orders in which the primaries (and run-off primaries) were held and the nominees chosen;

(2) the nominees for the 1992 general election to be conducted in each given numbered senatorial district established by S.B. 1 will be the nominees selected at the primaries for the "same numbered" senate district under this Court's plan;

(3) however, on the request of such a nominee who does not live in the S.B. 1 district for which he was "nominated" as aforesaid, the state party chair may declare the nominee ineligible, in which event the party executive committee may designate the nominee for such S.B. 1 district.[5]

There has been no preclearance of the August 6 directive or the procedures mandated or authorized thereby. However, it appears that on August 14 the state forwarded a section 5 preclearance request in this respect to the Department of Justice, although maintaining that such was not necessary.

To place the August 6 directive in context, it is necessary to understand that the same numbered senate districts in this Court's plan under which the primaries were conducted and those in S.B. 1 are each different geographical regions with different populations. None of the thirty-one same numbered district are the same. While there is relatively close correspondence in a few districts,[6] in the others there is wide-in one case total-disparity. Thus, S.B. 1 senate district 24 is comprised entirely of counties none of which were included (in whole or in part) in court plan district 24, and the populations and territories of the two districts are 100% distinct; the only commonality between the two is that each is described by the same number "24." District 24 under the court plan was a minority district; S.B. 1 district 24 is not a minority district.

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elections, the appropriate State Chair shall administratively declare the nominee ineligible under Section 145.003 of the Texas Election Code by the deadline of August 31, 1992.

4. In the event a nominee is administratively declared ineligible under Section 145.003 of the Texas Election Code, the appropriate party executive committee may name a replacement nominee under Sections 145.036 and 145.037 of the Texas Election Code not later than September 4, 1992. A replacement nominee must meet the qualifications of Article III, Section 6 of the Texas Constitution and may include a previous nominee who was administratively declared ineligible under Item 3 above.

Any questions concerning lines or maps of S.B. 1 should be directed the Texas Legislative Council at (512) 463-1143. Any questions concerning any other matter relating to the election of the Texas Senate should be directed to John Tunnell, General Counsel to the Secretary of State, at (512) 463-5701."

5 Such replacement nominee must meet residence requirements in the S.B. 1 district for which so nominated, but may be one who was nominated in the primary for a district with a different number under this Court's plan and who, at his request, was declared ineligible for such district by the party chair under the above provisions.

6 In 4 of the S.B. 1 districts the percentage of the population that was included in the same numbered court district is at or above 95% (the highest being 98.4%). In all the other S.B. 1 districts the percentage is less than 95%.

Similarly, in S.B. 1 district 6, only 3.4% of the population lives in any of the area included within court plan district 6. In S.B. 1 district 26, only 2.1% of the population lives in any of the area included within court plan district 26. In S.B. 1 district 15, only 14% of the population lives in any of the area included within court plan district 15. In some eleven of the thirty-one S.B. 1 districts less than half of the population consists of persons living in any of the area included within the same numbered court plan district.[7]

The parties focus on two principal contentions:

First, movants contended that the August 6 directive may not be implemented because it has not been precleared under section 5. The Justice Department agrees with this position. The state and Slagle contend that S.B. 1 having been precleared, no further preclearance is necessary.

Second, movants contend that the August 6 directive conflicts with this Court's December 24 and January 10 orders because those orders require use of the court plan senate districts for the 1992 elections. The state and Slagle contend that this Court's said orders pertain only to the 1992 primary elections and may not be construed to extend to the 1992 general elections.

We agree with movants, and disagree with the state and Slagle, on both grounds. And we grant relief accordingly.

Turning first to the matter of preclearance, this is required by section 5 of the Voting Rights Act respecting

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7 In approximately 17 of the S.B. 1 districts less than 75% of the population consists of persons living in any of the area included within the same numbered court plan district.

any change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. In *NAACP v. Hampton County Election Commission*, 105 S.Ct. 1128 (1985), the Supreme Court stated that "Congress specifically endorsed a broad construction" of this provision, *id.* at 1134, that the Court had applied it to, among other things, changes in candidate residence requirements, alteration of municipal boundaries, and the location of polling places, *id.* n.22, and that "the construction placed upon the Act by the Attorney General . . . is entitled to considerable deference." *Id.* at 1135. The Court then went on to say:

> "Under Department of Justice regulations"
>
> 'Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.' 28 CFR § 51.11 (1984).
>
> Among the specific examples of changes listed in the regulations is '[a]ny change affecting the eligibility of persons to become or remain candidates." § 51.12." *Id.* at 1135-36.

Texas law and practice has consistently been that at the general election for state offices the nominees of the respective political parties are those nominated at the preceding party primary elections. Texas Election Code §§ 161.008, 172.001. Primary elections for offices chosen by the electorate in separate geographical districts obviously make no sense unless the districts are the same for the

ensuing general election as for the primary, and we must presume that this is the intendment of the Texas law. We agree with the Justice Department's undisputed assertion that "To our knowledge, the State of Texas has never held or sought to hold a general election under a redistricting plan different from the plan used for the preceding primary election." Because the Secretary of State's August 6 directive makes this vast departure from settled Texas law and practice, it is clearly a change for purposes of section 5.

The August 6 directive makes other changes within section 5. Thus, the directive authorizes persons to be general election candidates, and to be elected, in an S.B. 1 district even though they do not meet the Texas Const. art. III § 6 residency requirements for that district, so long as they won the primary in the same numbered court plan district, a district that may be totally or substantially different (and certainly will be somewhat different).[8]

The state argues that the August 6 directive merely implements S.B. 1, which has been precleared. We reject this contention, just as the Supreme Court rejected a parallel contention in *Hampton County Election Commission*, 105 S.Ct at 1136-37. We note that nothing in S.B. 1 purports to authorize the choosing of party nominees by primaries in districts different from those to be used in the

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8 This Court's December 24 order did waive the residency requirement "for elections held under the State House and State Senate interim plans in 1992," but this reference to "interim plans" was clearly to the Court's plans, as is made clear from the fact that in the two paragraphs immediately preceding the paragraph just before that dealing with residency the Court's plans are each described as "this Court's interim plan."

general election. Indeed, S.B. 1 plainly contemplates that the same districts will be used for the general elections as for the primaries. Nor does it speak to residency requirements. Further, nothing in the opinion or judgment of the District of Columbia District Court speaks to any of these matters.

The state also contends that because the August 6 directive is within the powers conferred on the Secretary of State by divers provisions of the Texas Election Code, which have themselves been precleared, further preclearance is not required.[9] The provisions relied on by the state are of the most general character, and none come close to addressing the subject matter of general election nominees for particular districts being chosen on the basis of primary elections in other districts, or to waiver of residency requirements.[10] We reject this contention for essentially

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9 Movants dispute that the Secretary of State has this power under state law, a proposition with which we are inclined to agree but need not reach. We agree with movants' further contention that even if the Secretary of State does have such general power, his exercise of it in a particular case must nevertheless be precleared.

10 The state relies on Tex. Elec. Code §§ 31.001, 31.003, 31.004, and 31.005. These sections provide:

" § 31.001. Chief Election Officer

(a) The secretary of state is the chief election officer of the state.

(b) The secretary shall establish in his office an elections division with an adequate staff to enable him to perform his duties as chief election officer. The secretary may assign to the elections division staff any function relating to the administration of elections that is under his jurisdiction."

"§ 31.003. Uniformity

The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the elections laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws."

"§ 31.004. Assistance and Advice

(a) The secretary of state shall assist and advise all election authorities with regard to the application, operation, and interpretation of this code and of the election laws outside this code.

(b) The secretary shall maintain an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties."

"§ 31.005. Protection of Voting Rights

(a) The secretary of state may take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes.

(b) If the secretary of state determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply, the secretary may seek enforcement of the order by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general."

While the state also points to Tex. Elec. Code §§ 145.003, 145.035, 145.036, and 145.037, which are more specific, none of these provisions speak to or purport to authorize the changes mentioned in the text.

the same reasons as were stated by the court in *United States v. State of Texas*, Civil Action No. SA-85-CA-2119 (W.D. Tex. Aug. 1, 1985) (three-judge court), *aff'd* 106 S.Ct. 844 (1986), *viz*:

> "Nor do we agree with the State's contention that preclearance of the election code carried with it approval by the Attorney General of whatever emergency election schemes were subsequently ordered by the state election official. The construction of the Attorney General's prior action is made clear by his appearance in this case as well as by Department of Justice regulations:
>
> 'Enabling legislation and contingent or nonuniform requirements.
>
> (a) The failure of the Attorney General to interpose an objection to legislation: (1) That enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.'
>
> 29 C.F.R. § 51.14(a) (1984)."[11]

Were this not the law, municipal annexations and deannexations-which must be precleared, 28 C.F.R. § 51.13(e) (1991); *Hampton County Election Commission*, 105 S.Ct. at 1134 n.22-would rarely have to be precleared because most are conducted pursuant to pre-Voting Rights

11 This provision now appears at 28 C.F.R. § 51.15(a) (1991).

Act coverage, or previously precleared, general grants of authority by legislation or constitutional provision.

Accordingly, we hold that the August 6 directive must be, but has not been, precleared under section 5 of the Voting Rights Act, and may not be implemented.

We now turn to the question of the meaning, and hence the effect, of this Court's December 24 and January 10 orders with respect to whether the Court's interim plans therein promulgated apply to the 1992 elections generally or only to the 1992 primaries. If, as movants contend, they apply to the 1992 elections generally, then Hannah's August 6 directive is clearly in violation thereof. The state and Slagle, pointing to the frequent use in the orders of the word "primary," as well as the reference to the "interim" nature of the plans, contend that they apply only to the primaries. We disagree. Although there is a certain surface, technical plausibility in defendants' argument in this respect, we conclude that when read as a whole and in context it is clear beyond reasonable dispute that the orders contemplate and require use of the court-ordered plans throughout the 1992 elections.

In common and universal usage the words "primary elections," with respect to offices filled by election from diverse geographically defined single member districts, mean elections in which will be chosen the party nominees for the next general election in the same district as that in which the primary election takes place. And this is clearly the accepted meaning of the term in the law and long settled practice of Texas. It cannot have reasonably been thought that our orders used the words in any other sense.

Moreover, for a redistricting case, particularly one under the Voting Rights Act, to order a redistricting plan fixing the boundaries of the several single member districts for the primaries only, and not for the next general election at which the officials would actually be selected, would be the height of futility and purposelessness.

Other textual and contextual considerations point in the same direction. Our December 24 order expressly grants plaintiffs' motion for interim relief filed November 27 in cause No. 426, which motion clearly requests implementation "of an alternate redistricting plan for the 1992 election for the Texas Senate" and is obviously not limited to the 1992 primary, but seeks interim relief in the sense of relief only for the 1992 election. The December 24 order waives residency requirements "for elections held under the State House and State Senate [court ordered] interim plans in 1992," clearly indicating that the court ordered plans applied throughout the 1992 elections. They were "interim" only in the sense that they did not govern after the 1992 elections. And, the December 24 order characterized itself as providing for the holding of elections "in accordance with existing state law," which clearly contemplated that the same districts would be used for the general election as for the preceding primary.

Similarly, our January 10 order characterizes our December 24 order as providing "for the holding of 1992 elections as scheduled under Court-ordered interim plans." While we said we did not intend to limit the legislature in thereafter adopting "permanent plans," this clearly referred to plans for 1994 and subsequent elections, as our citation

to the action of the Texas House in the 3rd called session plainly reflects (H.B. 1).[12] This likewise reflects our understanding -and our understanding of the House's understanding-that our orders governed the 1992 elections, general as well as primary.

Our prior orders directed the 1992 House and Senate elections-general as well as primary-be held according to the districts specified in the orders. These orders have been affirmed on the merits by the United States Supreme Court. The August 6 directive is unlawful because it is in conflict with this Court's said previous orders.

IT IS ACCORDINGLY ORDERED, ADJUDGED and DECREED:

1. That the August 6 directive may not be implemented because it has not received the preclearance required under section 5 of the Voting Rights Act and, in any event, because it conflicts with this Court's said orders of December 24 and January 10, which said orders apply to the 1992 Texas Senate (and House) elections, both general and primary;

2. The state defendants, and Slagle and Meyer, and any and all persons acting in concert with any of them, are hereby enjoined from implementing or complying with said August 6 directive, and ordered to set aside any action heretofore taken under or pursuant thereto; and,

3. That the state defendants, and Slagle and Meyer, are hereby ordered to carry out the 1992 Texas Senate general elections according to and utilizing the

12 Obviously, it did not refer to S.B. 1, which we rejected.

senate districts established in this Court's said December 24 and January 10 orders.

IT IS FURTHER ORDERED that the injunction provided for in paragraphs 2 and 3 above shall be effective upon the filing by plaintiffs of a bond in the amount of $500.00.

SIGNED this the 21st day of August 1992.

s/s
Will Garwood
United States Circuit Judge

s/s
Harry Lee Hudspeth
United States District Judge

s/s
Walter S. Smith, Jr.
United States District Judge